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12 **KENNETH CANNATA**

13 **UNITED STATES DISTRICT COURT**

14 **DISTRICT OF NEVADA**

15 HP TUNERS, LLC, a Nevada limited liability
16 company;

17 CASE NO. 3:18-CV-00527-LRH-WGC

18 Plaintiff,

19 vs.

20 KENNETH CANNATA,

21 Defendants.

22 **DEFENDANT KENNETH
CANNATA'S MOTION TO STRIKE
PORTIONS OF PLAINTIFF HP
TUNERS, LLC'S SUR-REPLY [ECF
NO. 162]**

23 Defendant Kenneth Cannata ("Cannata") hereby files this Motion to Strike (the "Motion")
24 in response to Plaintiff HP Tuners, LLC's ("HPT") *Sur-Reply in Further Support of Motion for*
25 *Summary Judgment on First Cause of Action* [ECF No. 162] (the "Sur-Reply"). This Motion is
26 supported by the papers and pleadings on file herein, the following Memorandum of Points and
27 Authorities, and any oral argument this Court may entertain on the Motion.

28 DATED this 10th day of March, 2022.

SHEA LARSEN

29 /s/ Bart K. Larsen, Esq.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

HPT’s Sur-Reply was filed at the request of this Court by way of its Order [ECF No. 157] granting in part and denying in part both HPT and Cannata’s competing Motions for Summary Judgment. Specifically, the Court requested a “sur-reply on the discrete issue of whether the software and information Cannata shared with Sykes-Bonnett constituted derivative versions of HPT’s IP Identified in the Operating Agreement.” [ECF No. 157] at p. 24.

HPT’s Sur-Reply, however, relies largely on information that was not disclosed during discovery. Indeed, the Sur-Reply, as well as the Declaration of Keith Prociuk submitted therewith as Exhibit A, put forth an alleged comparison of select portions of the original “Technology” described in the Operating Agreement against certain HPT files allegedly shared by Cannata in 2016. While the HPT files allegedly shared in 2016 were disclosed during discovery, the original “Technology” was not. Discovery in this matter closed nearly a year ago on March 31, 2021.¹ It is highly prejudicial and entirely inappropriate for HPT to now attempt to use the previously undisclosed “Technology” to salvage its claim for breach of fiduciary duty against Cannata. Accordingly, Cannata respectfully request that the Court strike those portions of the Sur-Reply and supporting declaration that reference the “Technology”. Specifically, Cannata asks that the Court Strike lines 1 – 4, 9 – 14, and 20 – 23 of page 6 of the Sur-Reply [ECF No. 162] as well as paragraphs 7, 9, and 11 of the supporting Declaration of Keith Prociuk [ECF No. 162-1].

II. THE SUR-REPLY AND DECLARATION SUBMITTED THEREWITH MUST BE STRIKEN IN PART PURSUANT TO FRCP 26

Federal Rule of Civil Procedure 26(a)(1)(A)(ii) requires a party to provide to the other party a copy or description of “all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses.” If a party fails to provide information required by FRCP 26(a), “the party is **not allowed to use that information...to supply evidence on a motion**, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” FRCP 37(c)(1). The Ninth Circuit has routinely stated

¹ See ECF No. 108.

1 that “Rule 37(c)(1) is an ‘automatic’ sanction that prohibits the use of improperly disclosed
 2 evidence.” *Merchant v. Corizon Health, Inc.*, 993 F.3d 733, 740 (9th Cir. 2021) (citing *Yeti by*
 3 *Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001)).

4 In its Sur-Reply and the Prociuk Declaration, HPT relies on excerpts of code allegedly
 5 contained in the original “Technology” to attempt to show similarities between such code and code
 6 contained in certain files allegedly shared by Cannata in 2016. *See* Sur-Reply, 6:1-25; Declaration
 7 of Keith Prociuk, Exhibit A to the Sur-Reply, ¶¶ 7-12. However, no code from the original
 8 “Technology” was ever disclosed during discovery. The “Technology”, as HPT seeks to use it in
 9 the Sur-Reply, undoubtedly falls under documents or information that HPT “may use to support its
 10 claims or defenses.” FRCP 26(a)(1)(A)(ii). HPT’s failure to disclose the “Technology” during
 11 discovery denied Cannata the opportunity to have his expert witness analyze the code contained
 12 therein or to offer expert opinions as any similarities that may exist between such code and the files
 13 HPT claims Cannata improperly shared in 2016. Because the “Technology” was not disclosed
 14 during discovery, HPT must be barred from now offering it as evidence in support of the Sur-Reply.

15 HPT cannot establish that its failure to disclose the “Technology” was justified or harmless.
 16 *See, e.g., Yeti by Molly, Ltd.*, 259 F.3d at 1106 (“...the burden is on the party facing sanctions to
 17 prove harmlessness.”). Discovery has been closed for nearly a year. Any new disclosures at this
 18 point, especially considering the technical nature of the software code comparison, is unfairly
 19 prejudicial to Cannata. *See id.* (citing *Quevedo v. Trans-Pac. Shipping, Inc.*, 143 F.3d 1255, 1258
 20 (9th Cir. 1998) (refusing to consider expert report because it was filed one-and-a-half months late);
 21 *see also Dayton Valley Investors, LLC v. Union Pac. R.R.*, No. 2:08-cv-00127, 2010 U.S Dist.
 22 LEXIS 103232 (D. Nev. Sept. 24, 2010) (granting a motion to strike and collecting cases from the
 23 9th Circuit stating that any information that requires the reopening of discovery is not harmless).

24 Further, the Prociuk Declaration is not adequate to establish the alleged derivative nature of
 25 the work in question. The Declaration identifies nothing unique or proprietary concerning the code
 26 in question that would justify trade secret protection. Moreover, expert testimony is necessary to
 27 show the derivative nature of software through code comparison. *See, e.g., Dropzonems, LLC v.*
 28

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1 *Cockayne*, No. 3:16-cv-02348, 2019 U.S. Dist. LEXIS 225681 (D. Or. Sept. 12, 2019) (finding a
2 declaration to be inadmissible because the comparison was not performed by an expert); *But see R.C.*
3 *Olmstead, Inc. v. CU Interface, LLC*, 657 F. Supp. 2d 878, 894 (N.D. Ohio 2009) (after noting the
4 complexity of computer software, concluded that expert testimony was necessary “to establish what
5 elements, if any, are necessary to the function” of the software and, therefore,
6 unprotectible); *Integrated Bar Coding Systems, Co. v. Wemert*, 2007 U.S. Dist. LEXIS 9952, 2007
7 WL 496464, at *4 (E.D. Mich. 2007) (in a case alleging copyright infringement of software code,
8 opined that “[s]ubstantial similarity should be considered from the viewpoint of . . . those with
9 knowledge and expertise in computer programming;” noted that “the lay public does not possess
10 knowledge of what constitutes creativity in the computer code writing industry, which elements are
11 standard and which elements are dictated by efficiency or by external standards”).

12 Lastly, the fact that HPT shared excerpts of the code it claims Cannata improperly disclosed
13 in publicly filed documents severely undercuts HPT’s claim that such code constitutes a protectible
14 trade secret. Indeed, a trade secret only garners protection if reasonable measures are taken to keep
15 such information secret. “If an individual discloses his trade secret to others who are under no
16 obligation to protect the confidentiality of this information, or otherwise publicly discloses the
17 secret, his property right is extinguished.” *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984).

18 | III. CONCLUSION

19 Based on the foregoing, Cannata respectfully requests that the Court enter an order striking
20 lines 1 – 4, 9 – 14, and 20 – 23 of page 6 of the Sur-Reply [ECF No. 162] as well as paragraphs 7,
21 9, and 11 of the supporting Declaration of Keith Prociuk [ECF No. 162-1].

22 DATED this 11th day of March 2022.

SHEA LARSEN

/s/ *Bart K. Larsen, Esq.*

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on March 11, 2022, I electronically transmitted the foregoing **MOTION**
3 **TO STRIKE PORTIONS OF HP TUNERS, LLC'S SUR-REPLY [ECF NO. 162]** to the Office
4 of the Clerk of the United States District Court, District of Nevada, using the CM/ECF System, for
5 filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants listed for this matter.

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7 By: /s/ Bart K. Larsen, Esq.

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